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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SANDRA COOPER, Plaintiff and Appellant, v. YOUNG MOBIL GAS et al. Defendants and Respondents.	B169194 (Los Angeles County Super. Ct. No. YC044571)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Cary Nishimoto, Judge. Affirmed.

Law Offices of Jacobson & Associates and Jerry A. Jacobson for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

Sandra Cooper filed a personal injury action against Young Mobil Gas Station. After Cooper's counsel failed to respond to an order to show cause, the trial court dismissed the action for failure to serve the complaint. Cooper's counsel sought to set aside the dismissal, contending he had never received notice of the order to show cause but offering no explanation for his failure to timely serve the complaint. The trial court denied the motion, and Cooper appealed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The record on appeal is incomplete and makes it difficult for this court to determine the factual and procedural history of this action. The trial court apparently issued an order to show cause on August 16, 2002 directing Cooper's counsel to file "an attorney declaration stating facts showing cause why sanctions, including dismissal, should not be imposed for failure to prosecute" the action. No declaration was filed, and no evidence was presented to the trial court that Cooper had timely served her summons and complaint or had made diligent efforts to do so. Accordingly, on November 21, 2002 the trial court imposed monetary sanctions against counsel and dismissed the action for failure to prosecute.

On January 7, 2003 the trial court denied without prejudice Cooper's motion to set aside the dismissal after counsel failed to appear at the hearing on the motion. The court's minute order noted, "no excusable reason is given for the failure to serve defendant." Counsel filed another motion to set aside the dismissal on April 9, 2003. The motion and supporting declaration blamed counsel's failure to appear at the order to show cause on various calendaring and computer failures, but once again failed to give any reason for his failure to serve the complaint. The trial court denied the motion on May 5, 2003, finding the motion untimely and based on inconsistent excuses for counsel's failure to appear at the order to show cause.

DISCUSSION

The Record on Appeal Is Inadequate for This Court to Review the Trial Court's Decision

A fundamental rule of appellate review is that an appealed judgment is presumed correct. "'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. . . .'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; see also *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) To overcome this presumption, the appellant must provide an adequate appellate record demonstrating error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.) "[I]f the particular form of record appears to show *any* need for *speculation or inference* in determining whether error occurred, the record is *inadequate.*" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶ 4:43, p. 4-9.) If the record is inadequate, we affirm the appealed judgment. (*Estrada v. Ramirez* (1999) 71 Cal.App.4th 618, 620, fn. 1 [burden is appellant's to provide adequate record on appeal to demonstrate error; failure to do so "precludes an adequate review and results in affirmance of the trial court's determination"].)

The record on appeal does not contain the complaint or the order to show cause re: sanctions. Nor does it contain the original motion to set aside the dismissal, although it does contain the trial court's January 7, 2003 order denying that motion without prejudice. Although Cooper's brief on appeal refers to a May 6, 2003 motion for reconsideration, our record does not include a copy of any such motion for reconsideration but does include a "motion to set aside dismissal" filed on April 9, 2003 and denied by the trial court on May 6, 2003. Because of the inadequacy of the record, we must presume the judgment is correct and affirm it on that basis. (*In re Marriage of Arceneaux*, *supra*, 51 Cal.3d at p. 1133; *Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564.)[1]

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[1] Even if we were to rule on the merits, moreover, we would find no abuse of discretion by the trial court. Contrary to the premise underlying Cooper's appeal, it

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.

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appears from the record before us that the trial court did not dismiss the action for failure to appear at the hearing on the order to show cause, but for failure to timely serve the summons and complaint in accordance with the California Rules of Court and applicable local rules. In seeking to set aside the dismissal, Cooper's counsel filed declarations and points and authorities offering inconsistent versions of the claimed "excusable neglect" that led to his failure to respond to the original order to show cause. He apparently never once addressed his failure to serve the summons and complaint within the requisite time or satisfactorily explain why those documents had never in fact been served. Under these circumstances we cannot say the trial court abused its discretion in dismissing the action. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331-332 [trial court has broad discretion to dismiss action for failure to prosecute; decision will not be reversed """unless a clear case of abuse is shown and unless there has been a miscarriage of justice"""].)